UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF BATTELLE MEMORIAL INSTITUTE, INC. Respondent	)	DOCKET NO. CWA-IV 94-509

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DETERMINATION OF LIABILITY AND DENYING RESPONDENT'S CROSS MOTION FOR SUMMARY DETERMINATION OF LIABILITY

This is a proceeding for Class I administrative penalties brought by the Director of the Water Management Division of the United States Environmental Protection Agency, Region IV ("Complainant") against Battelle Memorial Institute, Inc. ("Respondent" or "Battelle") for alleged unlawful discharge of a pollutant into the Halifax River, a navigable water, in violation of Section 301(a) of the Clean Water Act (the "Act"), 33 U.S.C. §1311(a).

The rules applicable to this proceeding are the proposed "Consolidated Rules of Practice Governing the Administrative Assessment of Class I Civil Penalties Under the Clean Water Act," 56 Fed. Reg. 29,996 (July 1, 1991) ("Part 28").

Section 28.25(a)(1) of the proposed "Consolidate Rules of Practice" provides that

> "[a]ny party may request, by legal argument with or without supporting affidavits, that the Presiding Officer summarily determine any allegation as to liability being adjudicated on the basis that there is no genuine issue of material fact for determination presented by the administrative record and any exchange of information."

On November 18, 1994, the Complainant filed such a Motion

for Summary Determination on the Issue of Liability pursuant to 40 C.F.R. proposed Part 28. Thereafter, Respondent filed a Response to Complainant's Motion for Summary Determination and Counter Motion for Summary Determination on the Issue of Liability. In accordance with the Order of the undersigned Presiding Officer, the parties filed response and reply briefs. The matter is now ripe for determination.

The initial Administrative Complaint (Docket No. CWA-IV 94-509), proposed on September 27, 1994, contained several allegations, some of which are not in dispute. Based upon a review of the Administrative Complaint along with Respondent's Answer, the parties are in agreement as to the following pertinent facts: Battelle owns and operates a facility in Ponce Inlet, Florida known as the Battelle Florida Material Research Facility. Pursuant to Section 402(a) of the Act, 33 U.S.C. §1342(a), Respondent was issued a National Pollutant Discharge Elimination System (NPDES) permit No. FL0035394 (the Permit), effective on September 1, 1990, with an expiration date of August 31, 1992. The Respondent had applied for renewal of the Permit on June 8, 1992, however the application was returned to the Respondent as being incomplete. The Respondent then failed to resubmit an application for, and did not receive, an NPDES permit renewal or a new permit for the discharge of a pollutant from the facility, prior to the expiration of the existing permit.[1]

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[1]On December 29, 1993, Battelle resubmitted a complete application. AR Dn 9. Complainant proposed issuance of a Draft Permit with the expected effective date of January 1, 1994.

Section 301(a) of the Act, 33 U.S.C. §1311(a) prohibits the discharge of a pollutant by any person except in compliance with the terms of Section 402 of the Act, 33 U.S.C. §1342, or other sections of the Act not relevant here. Section 502(12) of the Act, 33 U.S.C. §1362(12), defines the term "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." The elements of libility in this case which Complainant must prove by a preponderance of evidence are that Respondent, a person within the meaning of the Act, discharged pollutants into navigable waters from a point source,[2] and that such discharges were unpermitted, and thus not in compliance with Section 301 of the Act.

The issue germane to a determination of liability in this matter was first raised in Battelle's response to the allegations contained at paragraphs 2 and 10 of the Administrative Complaint. In answer to paragraph 2, Respondent stated that it "denies that it discharged a pollutant in violation of the Clean Water Act". In response to paragraph 10, Respondent asserted that "the nature of its operations are such that no measurable pollutants are

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(Administrative Record, Document Number ("AR Dn") 15.

[2]Although in response to paragraph 4 of the Administrative Complaint, Respondent admitted owning the facility in question, and confirmed its location it "denie[d] all other allegation in Paragraph 4." The remaining portion of the paragraph Respondent would appear to have denied is that it is a point source within the meaning of Section 502 of the CWA, 33 U.S.C. §1362. However, the Administrative Record must be taken as a whole, and there is no other reference or semblance of a denial that Outfall 001 from which the alleged discharges occurred falls within the definition of "point source" within the meaning of the aforementioned section of the CWA.

discharged into the Halifax River". See Respondent's Answer. Couching its position in other ways, throughout the pleadings, Respondent claims it is not discharging "pollutants" as that word is defined in the Clean Water Act because 1) it discharges no measurable pollutants, Answer p. 3; 2) the discharge of pollutants, if there is a discharge, is in a theoretical or technical sense, Answer p. 3; 3) it is not adding any measurable pollutants as the Discharge Monitoring Reports (DMRs) only show that pollutants are already in the Halifax River water that Battelle diverts, uses in its studies, and then discharges back into the Halifax River, Respondent's Counter Motion pp. 2 and 4; and lastly, 4) what is discharged are nondetectable quantities of pollutants, Respondent's Answer and Counter Motion.

Notwithstanding some variability in terminology, the only pertinent issue is whether there was "any addition of any pollutant to the Halifax River from point source Outfall 001, such that there was a 'discharge of pollutants' within the meaning of Section 502(12) of the Clean Water Act, 33 U.S.C. §1362(12).

At the outset a description of Respondent's operations is helpful. As explained by Arlene A. Henrickson, Battelle's Environmental Compliance Supervisor at the time the permit renewal application was filed, the operations of the facility are as follows:

> "The operations of our facility are very limited. We evaluate the effects of sea water on small concrete pipe samples (3"-5" diameter x 20" long) and small painted metal

> strips (4" x 12"). Water is pumped out of the Halifax River, filtered through sand filters, then flowed through two tanks (one containing approximately 120 concrete pipe samples and the other containing approximately 40 metal strip samples) and then discharged back into the Halifax River. The primary purpose of our testing is to assist in the development of less toxic anti-fouling agents. We add no chemicals to the flow through sea water and only low toxicity anti-fouling agents are incorporated in the paints that are on the metal strips being tested." (AR Dn 9)

A threshold matter must be addressed first. Respondent adamantly protests Complainant's assertions that based upon Connecticut Fund For Environment, Inc. v. Upjohn Co., 660 F. Supp. 1397 (D. Conn. 1987), the appropriate time and forum within which to have argued that it was not discharging without a permit was during the permit process, and that objections to the permit are not allowable during enforcement proceedings.[3] Respondent contends that if there was no permit, how could it be challenging any permit for the time period in question. Technically, Respondent is correct. However, to the extent that this action is not brought in a vacuum, but rather against a facility that had a permit, had applied for a renewal, and had thereafter resubmited a corrected application, it's position is somewhat weakened. For instance, on November 16, 1993, Complainant issued Administrative Order No. 94-003 to Battelle pursuant to Section 309(a) of the Act, 33 U.S.C. §1319(a), for discharging without a

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[3]According to 40 C.F.R. §28.4(c)(6) of the Consolidated Rules of Practice, objections to permit provisions would be outside the scope of the Presiding Officer's authority.

permit and for failure to timely submit a permit application. (AR Dn. 8). Rather than taking that opportunity to raise as a defense to that enforcement action, that Battelle is not discharging pollutants in violation of the Act, Battelle on December 29, 1993, resubmitted a revised NPDES renewal application, along with a letter apologizing for the error in not having provided the necessary information earlier (AR Dn. 9). Although an enforcement action such as the one at hand, is indeed the appropriate forum to raise defenses to allegations of discharging without a permit, the Court cannot ignore all the correspondence, communications, and documents that transpired between the parties during the permitting process to date. Although I agree that Respondent is in no way prohibited from raising these arguments in this forum, Battelle's failure to do so during numerous stages of the permitting process, while not dispositive, is certainly relevant to the outcome here.

Respondent's permit applications list discharges of conventional, unconventional and toxic "pollutants". See Section V, "Intake and Effluent Characteristics" of the incomplete June 4, 1992, application, certified by Maurice G. Starks, Vice-President, (A.R. Dn. 6) as well as the same section of the completed application dated December 30, 1993, certified by John H. Doste, Sr. V.P., CFO & Treasurer, (A.R. Dn. 9). Also incorporated by Section VIII. of the current application is a laboratory analysis showing 001 discharges above Halifax River background for at least Chloride, Turbidity, Specific

Conductance, COD, Cadmium, and Zinc. Furthermore, Respondent's expired permit contained pH, a conventional pollutant at §304(a)(4) of the Act, 33 U.S.C. §1314(a)(4), as an effluent limitation. See expired permit (A.R. Dn. 5, page I-1) and new draft permit (A.R. Dn. 15, page I-1). The Respondent reported effluent pH levels during the entire period of its violation. See DMRs (A.R. Dn. 17). In a letter dated April 27, 1994, from Eddie R. Swindell, Environmental Support Mananger, to the EPA Region IV, the Respondent presents tables that admit to discharges of pH at levels either acidic or alkaline with respect to the waters of the Halifax River during the period of violation (A.R Dn. 12, TABLE 3). Furthermore, Respondent has stated that " with the exception of cadmium and boron the long term average effective concentrations in Outfall 001 of every constituent tested was less than or equal to the concentrations found in the Halifax River." See letter from Swindell dated April 27, 1994, (AR Dn. 12). But as Complainant suggests, what about cadmium and boron? Respondents inability to explain away those exceedances is an admission of discharge there as well.

Thus, the Administrative Record taken as a whole, indicates that there is a preponderance of evidence that Respondent discharged pollutants without a valid NPDES permit in violation of the Clean Water Act, leaving no genuine question with respect to this material fact.

In an effort to negate what was reflected in the DMRs and application, Mr. Pate's affidavit, attached to Respondent's Reply

and incorporated therein, hypothesizes other causes for pollutants in its effluent. Through Mr. Pate, Respondent explores issues of dynamics of the river system, impact of ocean tides, rate of speed at which the river water travels through the system before being discharge back into the river, vis a vis timing of sampling, and other such possibilities. See Pate affidavit p. 3. Respondent also claims that notwithstanding sampling results reflecting pollutants discharged in excess of levels in the receiving stream, it is Complainant that should offer an explanation for the measurable decreases". Reply p, 2. This is precisely what the legislative history of the CWA reflects was intended to avoid. Natural Resources Defense Council v. Texaco Refining., 719 F. Supp. 281 (D.Del 1989) is a case on point. In granting Summary Judgment to Plaintiffs, referencing the defense that permit violations were the result of sampling errors as evidenced by copies of documents submitted by defendants along with DMRs identifying errors, the Court noted:

> "Regardless of the credibility of the proof that defendant has submitted, defendant's sampling error defense conflicts with the legislative motivation behind the FWPCA..."

The court quoted pertinent portions of that legislative history,

> "The bill...establishes and makes precise new requirements imposed on persons and subject to enforcement. One of the purposes of these requirements is to avoid the necessity of lengthy fact-finding investigations at the time of enforcement. Enforcement of violations of requirements of this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision-making or delay." S.Rep. No. 414, 92nd Cong., 1st Sess. 64, reprinted in 1972 U.S. Code Cong. & Ad. News 3668, 3730..."

Similarly, Battelle's efforts fail to dissuade this Court of the determinative nature of the DMRs reflecting discharges of pollutants during the period of time the permit lapsed.

Having found that the DMRs along with the permit renewal application and correspondence establish the discharge of some pollutants into the Halifax River without a permit, it is unnecessary to reach the issue of whether discharge of toxic pollutants in undetectable quantities constitute the discharge of pollutants within the meaning of the Clean Water Act. Had those been the only pollutants in question, perhaps a determination of both the factual issue of whether the amounts discharged are actually non-detectable, as well as the issue of law regarding whether the Environmental Protection Agency has a policy of enforcing against discharge of non-detectable pollutants would be necessary. However, given that this is not a case to enforce exceedances of permit limitations, making necessary a decision as to which effluent limitations were exceeded, the finding that there was a discharge of even one pollutant without an effective permit is sufficient.

Lastly, Respondent argues that its process is analogous to a dam, so that it falls under the exemption espoused in National Wildlife Federation v. Gorsuch, 693 F. 2d 156 (D.C. Cir. 1982), that the discharge was not an "addition" of pollutants constituting a violation of the CWA.

The basis for Respondent's contention is that the intake water contains levels of pollutants greater or equal to the

effluent and that analogous to a dam, the contact of that intake water with the concrete and metal strips at Respondent's marine research facility does not result in any addition of any pollutant prior to discharge.

In addition to the several cases concerning dams cited by Complainant in its Motion and Response to the Counter-Motion, the case of Hudson River Fishermen's Association v. City of New York, 751 F. Supp 1088 (S.D.N.Y. 1990), is quite enlightening on this point. At p. 1102 the Court noted as follows:

> "The next contention advanced by defendants is that the contaminants complained of are not "add[ed]" to navigable waters by defendants, within the meaning of the Clean Water Act. Relying on National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) and National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988) defendants allege that the transfer of chemicals from the Hudson River into the West Branch Reservoir is not the "addition of any pollutant" because any such chemicals were in the Hudson River prior to and independent of the operation of the Chelsea Pumping Station.
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> In Gorsuch the District of Columbia Circuit addressed the issue of whether dam induced water quality changes are "additions" that trigger the NPDES permit requirement. 693 F2d at 164. That court held that no permit was required since a pollutant was not physically introduced "into the water from the outside world." Id at 175. A similar conclusion was reached in Consumers Power Co. when the Sixth Circuit held that a hydro-electric facility's movement of pollutants already in the water did not amount to an "addition of pollutants" so as to require a NPDES permit. 862 F.2d 580.
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> Here, however, defendants are adding chlorine and alum to the water with the intention of creating a partly chemical, partly physical reaction. It cannot be seriously disputed that chlorine, alum and the resulting floc are physically introduced in the water of the West Branch Reservoir and the Croton River from the outside.

In the case before me, Respondent evaluates the effects of sea water on concrete samples. As Battelle itself explains, one of the primary purposes of its research is to assist in the development of less toxic anti-fouling paints, resulting in less toxic releases from boats in fresh water and marine environments throughout the United States. As admirable as that is, and indeed it is extremely admirable, Respondent introduces pollutants into the Halifax River. Furthermore, as was the purpose of the addition of chlorine into the West Branch Reservoir in the Hudson River Fishermen's case, Respondent's overall activities may indeed be environmentally beneficial. Perhaps this is would be taken into consideration in a penalty determination. However, "...NPDES enforcement actions are based on strict liability, thus making intent and good faith irrelevant to the issue of liability." See Natural Resources Defense Council v. Texaco Refining, Id at 288, also citing SPIRG v. Monsanto Co., 600 F. Supp. 1479, 1485 (D.N.J. 1985).

The Respondent's legal argument does not support its denial of liability. In light of the finding of fact made below, the Respondent is as a matter of law, liable under Section 301(a) of the Clean Water Act for discharging pollutants without a permit[4]

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[4]Complainant cites the case of U.S. v. Plastics Universal Corp. and Adams Resources and Energy, Inc., 1985, EPA Consent LEXIS 208, in support of its position that contrary to Respondent's assertions, EPA has actively pursued enforcement actions against permittees that have allowed their permits to lapse. Coincidentally, for a limited time, the undersigned Presiding Officer represented the Complainant, EPA, Region IV, in that case. While the Court puts both parties on notice of its historic role in that matter, the case is of no relevance to the

and is therefore in turn liable for an administrative penalty under Section 309(g) of the Act. Complainant's Motion for Summary Determination is granted and Respondent's Counter Motion is denied. The actual amount of the penalty will be determined in a later phase of this proceeding. See Section 28.26 of the proposed Consolidated Rules.

As required by Part §28.25(e) of the Consolidated Rules, having concluded that Complainant is entitled to summary determination on the issue of liability, the undersigned Presiding Officer makes the following findings of fact and conclusions of law:

1. Battelle is a corporation organized under the laws of the State of Ohio, and is a "person" within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C. §1362(5).

2. Battelle owns and operates a facility in Ponce Inlet, Florida which was and is at all relevant times a point source within the meaning of Section 502 of the Act, 33 U.S.C. §1362.

3. The NPDES permit NO. FL0035394 issued to Battelle pursuant to Section 402 of the Act, 33 U.S.C. §1342, for the discharge of treated wastewater to the Halifax River, effective on September 1, 1990, expired on August 31, 1992.

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matter at hand. Whether EPA has a policy of bringing enforcement actions for allowing permits to lapse is not in issue in this case. Respondent's contention throughout its pleadings, has been that the Complainant does not have a policy of bringing enforcement actions in NPDES cases where nondetectable quantities of pollutants were involved. see Response Brief, p. 10. The Plastics case does not address that issue, as noted above, nor is there any necessity to reach a decision on that issue in the matter at hand.

4. Respondent failed to resubmit a complete application for, and did not receive, an NPDES permit renewal or a new permit for the discharge of a pollutant from the facility, prior to the expiration of the existing permit.

5. Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a), prohibits the discharge of a pollutant into navigable waters by any person except in compliance with the terms of a permit issued under Section 402 of the Act, 33 U.S.C. §1342, or in compliance with other sections of the Act not relevant here.

6. Based on Discharge Monitoring Reports, during the period from September 1, 1992, to March 31, 1994, inclusive, Respondent discharged "pollutants" from the facility to the Halifax River, a "navigable water," each within the meaning of Section 502(7) of the Act, 33 U.S.C. §1362(7).

7. Under section 309(g)(2)(A) of the Act, 33 U.S.C. §1319(g)(2)(A), Battelle is liable for the administrative assessment of a civil penalty not to exceed $10,000 per violation, up to a maximum of $25,000.

Susan B. Schub
Presiding Officer

Dated: June 1, 1995

IN THE MATTER OF BATTELLE MEMORIAL INSTITUTE, INCORPORATED,
DOCKET NO. CWA-IV 94-509

CERTIFICATE OF SERVICE

I certify that the foregoing Order Granting Complainant's Motion for Summary Determination of Liability and Denying Respondent's Cross Motion for Summary Determination of Liability, dated June 1, 1995, was sent this day in the following manner to the addressees:

Hand delivered:

Julia P. Mooney
Regional Hearing Clerk
U.S. EPA, Region IV
345 Courtland Street
Atlanta, Georgia 30365

John F. Callahan, Esq.
Assistant Regional Counsel
U.S. EPA, Region IV
345 Courtland Street
Atlanta, Georgia 30365

First Class Mail:

Adam J. Wagenback
Senior Attorney
Battelle Memorial Institute
505 King Avenue
Columbus, Ohio 43201-2693

6/5/95
Date

Patricia Olivier-Perry
Legal Technician